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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1983

CLARE BENEDICT HUDENBURG,

Petitioner,

VS.

GEORGE F. NEFF, Independent Executor of
Annette Gano Lummis,
AVIS HUGHES McINTYRE and NORTON BOND,
Executor of Rush Hughes,

Respondents.

On Writ of Certiorari To The
Court of Appeals of Texas,
Fourteenth Supreme Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Probate Court No. 2 of Harris County, Texas deprived Petitioner procedural due process by shortening the time of submission of a motion for summary judgment seeking a final adjudication tnat Petitioner is not an heir of Howard Robard Hughes.

PARTIES

Petitioner, Clare Benedict Hudenburg

Respondents, George F. Neff, Executor of the Estate of Annette Gano Lummis, Deceased;

Avis Hughes McIntyre;

Norton Bond, Administrator of the Estate of Rush Hughes, Deceased.

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GEORGE F. NEFF, Independent Executor of Annette Gano Lummis, AVIS HUGHES McINTYRE and NORTON BOND, Executor of Rush Hughes,

Respondents.

On Writ of Certiorari To The Court of Appeals of Texas, Fourteenth Supreme Judicial District

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals, Fourteenth Supreme Judicial District of Texas. Clare Benedict Hudenburg, Appellant vs. George F. Neff, Independent Executor of Annette Gano Lummis,

Avis Hughes McIntyre and Norton Bond, Executor of Rush Hughes, 643 S.W.2d 517 (Tex. Civ. App. 1982; n.r.e.).

OPINIONS BELOW

The opinion of the Court of Appeals is reported. Clare Benedict Hudenburg, Appellant vs. George F. Neff, Independent Executor of Annette Gano Lummis, Avis Hughes McIntyre and Norton Bond, Executor of Rush Hughes, 643 S.W.2d 517 (Tex. Civ. App. 1982; n.r.e.). The summary judgment entered by Probate Court No. Two of Harris County, Texas is not reported.

JURISDICTIONAL STATEMENT

The highest court in the State of Texas is the Supreme Court of Texas. The opinion and judgment of the Court of Appeals, Fourteenth Supreme Judicial District of Texas, in this case was filed and issued December 9, 1982. Discretionary review by the Supreme Court of Texas, by application for writ

of error, was denied by the Supreme Court of Texas on April 27, 1983. Thereafter the Supreme Court of Texas overruled Petitioner's motion for rehearing on June 8, 1983. The jurisdiction of this Court is invoked under U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fourteenth Amendment to the United States Constitution, provides in part: "... Nor shall any State deprive any person of life, liberty or property, without due process of law; ...".

Rule 166-A, Texas Rules of Civil Procedure (Appendix A hereto).

Article 1728, Vernon's Annotated Texas Civil Statutes (Appendix B hereto).

Article 1729 Vernon's Annotated Texas Civil Statutes (Appendix C hereto).

STATEMENT OF THE CASE

Petitioner filed a pleading in the Matter of the Estate of Howard Robard

Hughes, Jr., Deceased, in Probate Court No. 2 of Harris County, asserting that she was the daughter and heir at law of the deceased (Transcript*, p. 5). A motion for summary judgment against Petitioner was filed by George F. Neff (Tr. 29) and by Avis Hughes McIntyre and Norton Bond, Executor of the Estate of Rush Hughes, other claimed heirs of the deceased, against Petitioner (Tr. 17). Both motions were granted and the court entered judgment (Tr. 48) that the heirship claim of Petitioner was denied and dismissed with prejudice and that Petitioner take nothing by virtue of her claim to be an heir at law of the decedent. She appealed from this Judgment to the Court of Appeals, Fourteenth Supreme

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*References to the Transcript and Statement of Facts an to the State court proceedings. Petitioner shortly will request that they be certified and forwarded to this Court.

Judicial District of Texas. The Court of Appeals affirmed the judgment. The Supreme Court of Texas declined Petitioner's Application for Writ of Error.

The question presented in this Court is whether Petitioner was deprived of procedural due process accorded to her by the 14th Amendment to the United States Constitution because the probate court shortened the time for submitting the motions for summary judgment against Petitioner at a time when the probate court was aware the Petitioner's counsel had just withdrawn from the case and without any showing of any unusual circumstances which required the period of notice to Petitioner of submission of the motion be shortened. On page 13 of Petitioner's brief in the Court of Appeals, Petitioner argued that, her attorney of record having withdrawn, it behooved the trial court to allow her a sufficient time

to employ other counsel and to enable her new counsel to investigate and to take action and that "failure to do so would deprive her of due process guaranteed by the Fourteenth Amendment to the United States Constitution." The same argument was made verbatim at page 15 of Petitioner's application for writ of error submitted to the Supreme Court of Texas.

As indiciated above, Petitioner, Clare Benedict Hudenburg, filed in proceedings in the Matter of the Estate of Howard Robard Hughes, Jr., Deceased, in the Probate Court No. 2 of Harris County, Texas, a pleading asserting that she was the daughter of Howard Robard Hughes, Jr., Deceased (Tr. 5). This pleading was filed by the Houston firm of Reynolds, Allen, Cook, Pannill & Hooper, Inc., as attorneys for Clare Benedict Hudenburg and was signed by two

of its lawyers. The pleading also listed as "Of Counsel" the Los Angeles law firm of Herzfeld & Rubin, by Martin S. Friedlander. The pleading was not signed by Mr. Friedlander. A copy is attached as Appendix D.

On June 8, 1981, the probate court entered an order granting leave to withdraw to Petitioner's counsel, Reynolds, Allen, Cook, Pannill & Hooper. (Tr. 12) A copy is attached as Appendix E.

On June 26, 1981, a hearing was held on a motion for summary judgment relating to a claim filed on behalf of another claimant, Helen Koferd Cramer, and at the conclusion of the hearing attorneys for Avis Hughes McIntyre and Norton Bond, Executor of the Estate of Rush Hughes (hereinafter called "McIntyre, et al.") made the following statement in response to the court's inquiry,

> "Do we have any other motions for summary judgment to take up at this time?
>
> "MR. FISHER: ...Your Honor, with respect to the -- there is one matter that I might bring up on that subject. I am having some difficulty trying to identify which particular counsel we will be dealing with on the matter of the Clare Hudenberg, ... and I heard from another lawyer only two days ago, and he is not sure he is going to be in it, and to make a long story short, I would request the Court for leave, which would be permissible under rule 66-A, to file a summary judgment in that matter. Hopefully, if you could do it by Monday, I would have to ask leave of the Court to shorten the time if we could hear it on the morning of the 14th, and maybe I could identify with whom I will be dealing."

(Statement of Facts, Proceedings on Motion for Summary Judgment, Claim of Helen Koferd Cramer, p. 158.) The court inquired whether there were any counsel present representing Ms. Hudenbury, and received no response. (Id. p. 158)

Subsequently, on the same date a pretrial hearing was held. At the

inception of this hearing the court made the following announcement:

> "There are several things I want to bring up relative to where we were and where we are going from here in view of the ruling of the Court on the motion for Summary Judgment on Terry Moore's claim.
>
> "I would think that, at this point, we still must proceed forward with whatever testimony is available relative to the existence or non-existence of any other spousal claims, any other claims, or motions in limine that need to be considered in the light of category one, which is the spouses, children and brothers and sisters. These will be considered on the 13th of July."

The court continued:

> "I take it from what you indicated earlier, Mr. Fisher, that we are not sure who Counsel for Mrs. Hudenberg is at the present time.
>
> "Anybody here for Mrs. Hudenberg at the time?
>
> "MR. FISHER: Hudenberg. (Pronouncing)
>
> "THE COURT: Is it Hudenberg?
>
> "MR. FISHER: If I may, Your Honor, I think the firm

> of Herzfeld & Rubin in Los Angeles still professes to be Counsel, although they don't say they are local Counsel. I did receive a call from a lawyer named Hal Monk in Arlington on Wednesday, saying that he and his associate, John Collins in Arlington, were looking into the matter, and I did not get a definite answer from him as to whether tney were unequivocally going to represent her or not.
>
> "In line, Your Honor, with what I said this morning, it is probably an appropriate time to ask the Court if the Court would consider granting us leave to go ahead and file our motion, and maybe have it heard on the 13th to see what evidence they are going to come forward with.
>
> "We have taken some depositions in that case -- subject to a motion.
>
> "THE COURT: Any objections to the question? I will grant your motion, Mr. Fisher." (S.F., Pretrial Hearing, pp. 6-7) (Emphasis supplied.)

No motion was made for leave to shorten the time for submission of the motion for summary judgment of George F. Neff, Executor of the Estate of Annette Gano Lummis.

On June 30, 1981 motions for summary judgment were filed by McIntyre, et al. (Tr. 17) and by George F. Neff, Executor (Tr. 29). For the convenience of the Court we set out the following calendar for late June and early July, 1981:

Su	M	Tu	W	Th	F	Sa
					26	27
28	29	30	1	2	3	4
5	6	7	8	9	10	11
12	13					

Although the court specified that it would consider "any" motions for summary judgment relating to the claims of children on July 13th, the court did not specify when the motions for summary judgment had to be filed, nor how many days notice had to be given of any such motions. The court also did not specify how many days the opponents would have thereafter to file affidavits or other material in opposition to the motions.

As mentioned above, the pretrial hearing referred to above was held on a Friday, June 26th. Four days later the motions for summary judgment by McIntyre, et al. and Neff were filed, on the following Tuesday (June 30th). Copies of the motions are attached as Appendices F and G. Between the date of the filing of the two motions and the date of the hearing there were twelve days of which seven were working days (July 1, 2, 6, 7, 8, 9, 10), the balance of the time consisting of two weekends and the 4th of July holiday celebrated on July 3.

The certificate of service to the McIntyre, et al. motion said that "a true and correct copy of the foregoing instrument has been mailed, certified mail, return receipt requested, or via Lawyers Filing Service to all parties of record in this cause of action on the 30 day of June, 1981" (Tr. 15) without

specifying which of the two methods was used, or who the parties of record were. There followed a listing of a number of lawyers, without any specification of whom the lawyers represented. Included among these lawyers were Martin S. Friedlander of Herzfeld & Rubin at their address in Los Angeles, California, the "Of Counsel" listed in the pleading filed on Petitioner's behalf by her former attorneys, Reynolds, Allen, Cook, Pannill & Hooper. The certificate did not include any specific statement that a copy of the instrument was mailed to Clare Benedict Hudenburg.

The certificate of service to the motion for summary judgment of George F. Neff, Executor of the Estate of Annette Gano Lummis, stated that a copy had been mailed by certified mail to a number of attorneys, including Martin S. Friedlander of Herzfeld & Rubin in Los Angeles (Tr.

35-36). The certificate did not include any reference to a mailing to any parties of record.

On July 13th various motions were heard by the probate court including the motions for summary judgment against Clare Benedict Hudenburg. The court asked if Clare Benedict Hudenburg or her counsel were in the courtroom and if she was represented by counsel. No one answered on her behalf. (S.F., Heirship Hearing, p. 5, line 15) After considering other motions, the court returned to the Hudenburg matter. Counsel for McIntyre, et al. (Mr. Fisher) advised the court that Mr. Friedlander had appeared "of counsel" on pleadings (S.F., Heirship Hearing, p. 10), and also that Mr. Friedlander had attended the deposition of Ms. Hudenburg taken in Los Angeles. The deposition to which he referred was not on file on July 13th; it was subsequently

filed on July 31, 1981 -- eighteen days after the motions for summary judgment were granted. The deposition is a part of the appellate record. It was taken on April 22, 1981, that is to say, at a time when the Houston firm of Reynolds, Allen, Cook, Pannill & Hooper still were the only attorneys of record for Appellant, and when Friedlander was "of counsel". Mr. Fisher, counsel for McIntyre, et al., advised the court that Mr. Friedlander had written a note to the court, upon a proposed form of acknowledgment of service which he had refused to sign, stating

> "To the Court: This firm is not the attorney of record. We have never been the attorney of record. Movants have not complied with Texas law with respect to Notice. The procedure is improper as well as the motion. s/Martin S. Friedlander. 7/2/81".

(S.F., Heirship Hearing, p. 12; Neff Exhibit "A".) At no time did the Los

Angeles firm ever enter an appearance as counsel for Petitioner in the Texas proceeding and there is nothing to suggest that they were even licensed to practice law in Texas.

Mr. Fisher continued by stating to the court that copies of the McIntyre, et al. motion had been mailed to Clare Benedict Hudenburg in Las Vegas (S.F., Heirship Hearing, p. 12); however, he did not say when they were mailed to her: whether before or after Mr. Friedlander refused to accept service on her behalf on July 2, 1981. The record is devoid of any statement, certificate or other showing what was mailed to Petitioner, or when.

Counsel for George Neff, Executor (Mr. Lilienstern) offered into evidence the acknowledgment of service which Mr. Friedlander had refused to sign, with his note to the court written thereon

(Neff Exhibit "A"). He also offered an undated Postal Service form (Neff Exhibit "B") but he did not say what, if anything, was mailed to Ms. Hudenburg, or when. (S.F., Heirship Hearing, p. 27)

The argument in support of the two motions for summary judgment occupies 17 pages of the record. The unfiled deposition of Appellant was extensively discussed. No counsel participated as attorney of record for Ms. Hudenburg and Ms. Hudenburg herself did not appear. The court then announced his ruling, as follows:

> "THE COURT. Anything further, Gentlemen?
>
> "All right. Then, based upon the plea before the Court, including the various depositions and affidavits on file, I am going to grant the Motion for Summary Judgment on the claim of Clare Hudenberg."

(S.F., Heirship Hearing, p. 30) As noted above, only one deposition had been referred to in the argument (that

of Petitioner) and it was not on file when the court ruled. Although the Court of Civil Appeals has stated that the deposition of Petitioner was on file before the judgment was signed--several months later--it is clear that the trial court was in error in basing its ruling on "depositions ... on file" when at the time of the hearing no depositions were on file and there is nothing in the record to suggest any leave of court being granted subsequently to file them.

Thereafter, the hearing apparently turned to other matters (pp. 31-110), but eighty-one pages later (S.F., Heirship Hearing, p. 112), Hal Monk appeared on Petitioner's behalf to submit a motion for continuance which he had filed that morning (Tr. 39), and he urged the court to reopen the hearing for the purpose of presenting the motion for continuance. The court allowed him to present the

motion. He said that he had not accepted employment in the case until the previous Friday, when he was contacted by Ms. Hudenburg, who had intended to appear pro se, but who advised him that she had medical difficulties with her eyes which prevented her attendance. In addition to the motion for continuance he presented a telegram from her doctor (Tr. 37) stating that he had advised her not to travel until later in the month because she was being treated with a bandage lens for a painful eye condition. Counsel for McIntyre, et al. argued in response that "...[H]er physical presence doesn't add or detract from the merits of the motion for Summary Judgment that was presented and ruled on, and would therefore urge the Court to please overrule this motion for continuance," whereupon the motion for continuance was denied. (S.F., Heirship Hearing, p. 114)

It is quite clear that Petitioner in effect had no Texas counsel between the filing of the motions for summary judgment and their disposition. This is true notwithstanding the fact (recited by the Court of Civil Appeals) that the motion permitting her Texas counsel to withdraw recited that she was represented by the Los Angeles firm of Herzfeld & Rubin. That motion did not say that Herzfeld & Rubin were licensed to practice law in Texas or that they were entering an appearance as counsel for Petitioner in Texas. Petitioner was strictly "pro se" in Texas until Hal Monk accepted employment on the Friday before the Monday hearing of the motions. He did about all that a lawyer could do under the circumstances: he asked for more time.

Realistically speaking, the motion for continuance can only be considered

as a motion to set aside the summary judgment which had theretofore been granted. When the Court permitted it to be presented the Court had already heard arguments on the motions for summary judgment and had already granted the motions. Hal Monk pointed out to the trial court that Petitioner had not appeared on the motion for summary judgment because she was physically unable to be there. This should have caused the trial court to take cognizance of the fact that Petitioner's rights were being grievously prejudiced by the hurry-up procedure that had been adopted which entailed, in effect, a complete cancellation of Petitioner's right to prepare a written response on the merits.

The most shocking circumstance which bears upon the action of the trial court in shortening the time for submission of these motions for summary judgment is

the fact that the court had just eighteen days previously allowed Petitioner's attorneys of record to withdraw from the case. Petitioner's attorney of record having withdrawn by order entered June 8th, it behooved the trial court to allow her a sufficient time to employ other counsel and to enable her new counsel to investigate and to take action on her behalf. Failure to do so would deprive her of due process guaranteed by the 14th Amendment to the Untied States Constitution. Lowe v. City of Arlington, 453 S.W.2d 379 (Fort Worth Civ. App. 1970; n.r.e.). Yet only eighteen days after the trial court signed the order permitting her attorneys to withdraw, and with full knowledge of having done so, and being reminded at that very time that she had not employed other counsel, the trial court inexplicably on June 26th shortened the time for

submission of the motions for summary judgment against Petitioner.

The trial court in granting leave on June 26th to expedite the submission of motions for summary judgment did not say when the motions had to be filed, and therefore did not determine how many days were to be cut off of the normal twenty-one day period prescribed by Rule 166-A, TEX. R. CIV. P. As it happened, the motions were not filed until four days later, on June 30th. They were not mailed to Petitioner's attorney of record, because she had none. They were mailed to a Los Angeles attorney, Mr. Friedlander, who, though he may have been licensed to attend a deposition taken in California, is not shown to be licensed to practice law in Texas, and who could not serve as attorney of record in Texas without such a license; in any event, the fact that a Texas law

firm listed him "of counsel" could hardly be said to make him an attorney of record. There is no competent certificate or other showing of when any notice to Petitioner herself was given or what it contained.

The pertinent portion of Rule 166a, Texas Rules of Civil Procedure, specifies:

> "Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response."

The case of Gulf Refining Company v. A.F.G. Management 34 Limited, 605 S.W.2d 346 (Houston 14th 1980; n.r.e.), is closely analogous to the case at bar. That court held that a movant who filed a motion to dismiss, equivalent to a motion for summary judgment, was required

to give twenty-one days' notice of the hearing. Noting the provision of Rule 166a for expediting submission upon leave of the trial court, the court observed:

> "The court's discretionary power to permit service within that time period will not satisfy the requirements of due process. We hold that Rule 166-A requires notice of the hearing at least twenty-one days prior to the day on which it occurs."

The right to notice included the right to respond to the deposition testimony on which the movants relied. This is impossible where the deposition is not on file. Thus in Extended Services Program v. First Extended Service Corporation, 601 S.W.2d 469 (Dallas Civ. App. 1980; n.r.e.), the court stated that depositions filed after the hearing of a motion for summary judgment could not be considered, the court observing:

> "Thus the deposition of Wescott, filed 18 days prior to the hearing was not properly before the court as summary judgment evidence. Likewise, the depositions filed after the summary judgment hearing could not properly be considered because plaintiff did not have fourteen full days to respond."

In the case at bar the trial court did not grant permission for late filing of Petitioner's deposition: as shown by its ruling, the court had been led to believe that the deposition was on file at the time of its ruling.

The Respondents attempted to solve their due process problem by getting Martin Friedlander to sign the acknowledgment of service form which they jointly prepared and presented to him on July 2nd. This form was calculated to do two things: by typing "Attorneys for Clare Benedict Hudenberg" under the signature space they sought to subtly convert Friedlander from an "of counsel" to an

attorney of record (ignoring the problem of whether he was even licensed to practice law in Texas). Secondly, they sought to avoid the presumption embodied in Rule 21a that it took three days for the mail to arrive,* and to avoid the possibility that it might not be received until after the 4th day of July weekend which could have been proved.**

The emergency procedure was ill considered in any case. If Friedlander

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*"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period."

**"Nothing herein shall preclude any party from offering proof that the notice or document was not received, or, if service by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just."

accepted the proffered service as Petitioner's attorney of record on July 2nd he would have had only five working days to prepare for the hearing, starting Monday, July 6th, which also was his last day to file any opposing affidavits or other response.* The Rule contemplates, however, that the opponent will have fourteen days to devise a written response after being served with the movant's motion and the evidence supporting it.

There is in this record no evidence that any notice of the motions for summary judgment, or the hearing, was ever served upon either Petitioner or her attorney of record (because she had none). The procedure by which the trial court gave blanket authority on June 26

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*"Except on leave of court, the adverse party, not later than seven days prior to the date of hearing may file and serve opposing affidavits or other written response."

for the future filing on unspecified dates, of motions for summary judgment against Petitioner, to be heard on July 13th, without making any requirement with respect to when they had to be filed or how much notice had to be given of the motions, the evidence, or the hearing date cannot comport with due process of law under the Fourteenth Amendment to the United States Constitution. Accordingly, the summary judgment, dismissing her claim to decedent's estate, with prejudice, should be reversed and the cause remanded.

It is true that the last-minute efforts of Hal Monk, who accepted employment as counsel for Petitioner on Friday before the Monday hearing asserted only that Petitioner was physically unable to attend the scheduled hearings for July 13th. Mr. Monk did not hear the argument in support of the two

motions and could not respond thereto, and did not attempt to do so, but only presented the motion for continuance. If adequate notice had been given, no doubt Mr. Monk would have drafted a better motion, assigning proper grounds, predicated upon due process and lack of notice. However, the Fourteenth Court of Appeals in analogous circumstances made the observation:

> "While appellant's affidavits appear insufficient, not being made upon personal knowledge and containing other possible defects, such deficiencies do not override appellees' failure to give adequate notice. We cannot assume appellant would not have discovered and corrected these defects if it had had the proper length of time to prepare."

Gulf Refining Company v. A.F.G. Management 34 Limited, 605 S.W.2d 346 (Houston 14th 1980; n.r.e.).

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS OF TEXAS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY IN CONFLICT WITH DECISIONS OF THIS COURT.

The Petitioner has been deprived of a right both cherished and essential in our system of government, the right to her day in court, her right to due process of law--but the Texas courts did not see fit to address this important constitutional issue, duly raised on appeal. Historically, this right has been jealously guarded by the courts since it is the bedrock of a democratic government.

> "...[T]here are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence." Holden v. Hardy, 169 US 366, 389, 390, 42 L.Ed. 780, 790, 18 S. Ct. 383

Although the concept has never been rigidly defined by this Court, it has been characterized as embodying traditional notions of fair play. Hannah v. Larche, 363 U.S. 420, 442 (1960). The Petitioner relies not on any technical, complicated or esoteric theories of law but instead rests her case on this basic principle of fairness, guaranteed by the Fourteenth Amendment.

The gist of her complaint is that the court in an effort to clear up its docket arbitrarily shortened the time for submission of the Respondents' motions for summary judgment. The Petitioner did not have adequate notice of the hearing and was thereby denied an opportunity to be heard. At the outset, it must be recognized as the members of this Court have frequently pointed out, all levels of the United States court system are dangerously overburdened.

Whatever the solution may be to this crisis, depriving litigants of their due process rights is not the answer.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recongnizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officers no less, and perhaps more, than mediocre ones."

Stanley v. Illinois, 405 U.S. 645, 656, 31 L.Ed.2d 551, 92 S. Ct. 1208. In the case sub judice, the court overstepped the permissible boundaries of its discretion, See Bute v. Illinois, 330 U.S. 640, 649, and denied the petitioner the fundamental right to notice and an opportunity to be heard. Mullane v. Central Hanover

Bank & Trust Co., 339 U.S. 306, 313 (1950).

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 US 457, 85 L ed 278, 61 S Ct 339, 132 ALR 1357; Grannis v. Ordean, 234 US 385, 58 L ed 1363, 34 S Ct 779; Priest v. Las Vegas, 232 US 604, 58 L ed 751, 34 S Ct 443; Roller v. Holly, 176 US 398, 44 L ed 520, 20 S Ct 410."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314. It was totally unreasonable for the Respondents to send notice of the hearing to an attorney in another state, Mr. Friedlander, who never held himself out as the Petitioner's record counsel or even as being licensed to practice in Texas. He had only been listed as "Of Counsel" on the pleadings

filed by the Petitioner's former counsel, Reynolds, Allen, Cook, Pannell & Hooper. Furthermore, one of the Respondents' attorney, Mr. Fisher, had admitted on the record that he was "... having some difficulty trying to identify which particular counsel we will be dealing with on the matter of Clare Hudenburg...." [Citation] Later than same day in response to the court's question concerning the identity of Clare Hudenburg's attorney, Mr. Fisher admitted that Mr. Friedlander never professed to be her local counsel and that he knew there was a possibility that another local attorney, Hal Monk, might be involved. Under these circumstances, the movants were under a duty to use reasonable care to verify that either the Petitioner's record attorney, if she had one, or the Petitioner herself personally receive

notice. Accord Covery v. Town of Somers, 351 U.S. 141 (1956) (finding that the state was obligated to take measures to notify an incompetent beyond those taken to notify an ordinary person).

> "But when notice is a person's due, process which is a mere gesture is not due process."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 315. The Respondents' method of sending notice could not have been desirous of actually informing the interested parties because it was sent to a party whom they admitted was most likely not even record counsel. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 315.

Furthermore, once the Respondents learned that Mr. Friedlander had refused to accept the document, they were under a duty to insure that notice was properly given. The Respondents had the audacity

to offer as evidence of notice a proposed acknowledgement of service form which Mr. Friedlander had refused to sign stating:

> "To the Court: This firm is not the attorney of record. We have never been the attorney of record. Movants have not complied with Texas law with respect to Notice. The procedure is improper as well as the motion. s/Martin S. Friedlander. 7/2/81."

(S.F., Heirship Hearing, p. 12; Neff Exhibit "A".) Both counsel for Respondents claim that the Petitioner was personally notified by mail but did not specify on what day and offered only one undated postal service form as proof to support this contention. The fact that in some way at some time, perhaps by chance, the Petitioner learned of the hearing is not enough. Extra-official or casual notice does not satisfy the requirements of the due process clause. United States v. Chicago, Burlington, & Quincy Railroad

Company, 237 U.S. 410, 424 (1910) (Striking down a statute issuing execution against stockholders for unpaid subscription without notice).

Furthermore, the Petitioner was not afforded a reasonable time to appear and present her case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314. The trial court arbitrarily shortened the time period for submitting affidavits and briefs in opposition to the motions for summary judgment. Rule 166-A(c) of the Texas Rules of Civil Procedure provides that:

> "...Except on leave of court with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response...."

The trial court permitted the movants to file their motions on June 30, 1981 and

scheduled the hearing for July 13, 1981, only thirteen days later. Furthermore, Rule 21a of the Texas Rules of Civil Procedure provides:

> "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period."

Since there is no evidence that the court took this rule into account, the reduction of the time period is more drastic than it at first appears. Furthermore, this situation is exacerbated by the fact that the Respondents have offered no evidence proving on what day the Petitioner was notified.

The case at bar is analogous to Holly v. Roller, 176 U.S. 398, 44 L.Ed. 520, 20 S. Ct. 410. In Holly, the court held that service of process upon a defendant residing in Virginia requiring

him to appear and answer a suit in Texas in five days was not reasonable notice and therefore not due process of law. Although Holly was decided before the advent of rapid transit, the principles it embodies is still good law. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314 (citing Holly, due process "...must afford a reasonable time for those interested to make their appearance"). In the case sub judice, the Petitioner has been required to travel from Los Angeles, California to Houston, Texas, a distance of several thousand miles. There is no evidence other than the fact she notified Hal Monk on July 9 that she had notice prior to the date of the July 13th hearing. Even with the advent of rapid transit, four days is hardly reasonable time to make expensive and complicated arrangements to travel thousands of miles, let alone prepare an

answer by counsel totally unfamiliar with the case. These facts operated together to deny the Petitioner notice at a meaningful time and in a meaningful manner. Armstrong v. Manro, 380 U.S. 545 (1962).

The most startling feature of this case is the arbitrary nature of the ruling. The movants offered no arguments in support of the reduction in time, and the trial court made no explanation of its ruling. Very little if anything was gained by the trial court's short cut, although the Petitioner's constitutional rights were lost. Due process is "... flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The unusual circumstances of this case compelled increased protection of the Petitioner's rights, not that they be in jeopardy by the court.

Frequently, this Court has employed a balancing test in analyzing due process claims. Eg., Mathews v. Eldridge, 424 U.S. 319, 335, 47 L Ed 2d 18, 96 S. Ct. 893 (1976). However, in the case at bar, the petitioner is not urging that a new procedure be implemented. She merely contends that the standard procedure should have been followed rather than deviating from it. Of course, the petitioner does not contend that a court may never shorten the time period. But there should be a distinct showing of compelling urgency. Cf. Fuentes v. Shevin, 407 U.S. 67, 90, 32 L.Ed.2d 556, 92 S. Ct. 1983 (1972).

The constitutional aspect of the Petitioner's appeal was not even addressed by the Texas Court of Appeals in affirming the judgment of the trial court. The Texas Court of Appeals relied upon the Petitioner's sworn statement eighteen

days earlier in which she stated she was "currently represented by the law firm of Herzfeld & Rubin in Los Angeles ...." Hudenburg v. Neff, No. C14-82-108CV (Tex. Civ. App.--Houston [14th Dist.] (1982) in finding no error by the trial court. However, the Petitioner never stated that the Los Angeles firm was local counsel or that they were licensed to practice law in Texas. The Texas court ignored the trial court record in which an attorney of one of the movants admitted in court on the same day leave was granted to file the motion for summary judgment that he was not certain whom represented Ms. Hudenburg and that Mr. Friedlander had never professed to be local counsel (citation omitted).

Furthermore, the Texas court again overlooked the constitutional issues in holding that the appearance of Hal Monk in court on July 13th constituted a

waiver of any notice objections. The court held Rule 166-A of the Texas Rules of Civil Procedure required any response to the motion to be in writing. The issue, however, is not whether she technically complied with the statute. As Justice Brandeis stated,

> "Our present concern is solely with the question whether the [petitioner] has been accorded due process in the primary sense, -- whether [she] has had an opportunity to present [her] case and be heard in its support. ... Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it."

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681-82, 74 L.Ed. 1107, 1114. The Petitioner may not be penalized for failure to technically comply with a rule of civil procedure when she was never given an opportunity to do so.

The notice requirements of the United States Constitution cannot be waived by the mere appearance of counsel asking for a continuance. In D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, the court held that a cognovit provision in an installment credit contract waiving notice and a hearing by the debtor was valid if voluntarily, intelligently, and knowingly made. Although that case involved a contractual waiver, the principles are equally applicable here. The Petitioner had no inkling that by making the extra effort to expedititously contact an attorney that she would be worse off than if she had stood idle. Policy considerations weigh in favor of encouraging this conscientious action.

After all, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself

whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314. The whole point of Hal Monk's appearance was to inform the court that it was impossible for the Petitioner to appear and contest. The case at bar is clearly distinguishable from those cases finding the requirement of notice waived because in those cases the party appeared and contested the action on the merits. Louisville & N.R. Co. v. Schmidt, 177 U.S. 230. The Petitioner never had the option of choosing to default or contest.

The final blow to the Petitioner's rights was struck by the court's consideration of a deposition not in evidence at the time of the hearing. On appeal, the Texas Court of Appeals countered this argument by pointing out that Rule 166A(c) of the Texas Rules of Civil Procedure permits the court to consider

depositions and other written responses filed after the summary judgment hearing. Although that rule permits a court to consider evidence filed with permission after the hearing, there is no showing here that leave for late filing was given and the court recited that its ruling was based on "depositions [there was only one] on file [and it was not on file].

This case is analogous to Armstrong v. Manro, 380 U.S. 545 (1965). In Armstrong, a Texas statute authorizing an adoption hearing without notice to the natural father was found unconstitutional. The court held that the fact that the judgment could be collaterally attacked did not cure its constitutional defects because the burden of proof would shift. Id. at 551. The case at bar is analogous because the Petitioner has been denied an opportunity to be

heard "at a meaningful time and in a meaningful manner." Id. at 552. Assuming she had been given a reasonable opportunity to appear at the hearing and contest on the merits (which she was not) she could not properly respond to evidence not filed. The fact that it was a deposition of Ms. Hudenburg does not negate the fact that the judge erroneously considered evidence at the hearing not on file. Like Armstrong, the provision of the rule allowing evidence to be filed at the hearing does not remedy the damage already suffered at the time she was entitled to a hearing.

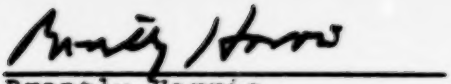
The Court of Appeals also disregarded the constitutional aspects of this issue by finding that the Petitioner had waived this objection by her failure to object at trial. At the risk of stating the obvious, it is rather difficult to object when one isn't present. The

Petitioner's attorney, Hal Monk, did not appear until after the hearing was completed and the court had ruled. As discussed above, the Petitioner may not be penalized for her failure to respond when she was effectively denied an opportunity to do so. See Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. at 681-82.

This argument that the Petitioner may not be penalized for her failure to properly respond to the movant's motion is the theme of this petition. It is based upon the principle of fairness. While her claim is simple, it certainly is not trivial for due process of law is the basis of a free society. See Holden v. Hardy, 149 U.S. at 389-90.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Petition for a Writ of Certiorari should be granted.



Brantly Harris
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(713) 960-9666

Attorney for Petitioner

OF COUNSEL:

PRAPPAS, MONCURE, HARRIS & EIDMAN 500
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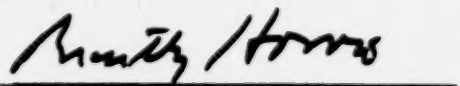
Houston, Texas 77056
(713) 960-9666

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for a Writ of Certiorari was mailed by certified mail, return receipt requested, on September 6, 1983, to all attorneys of record, as follows:

Mr. Berry D. Bowen
Andrews, Kurth, Campbell & Jones
2500 Exxon Building
Houston, Texas 77002

Mr. Wayne Fisher and
Mr. Shelton Smith
Fisher, Gallagher, Perrin & Lewis
2600 Two Houston Center
Houston, Texas 77002



Brantly Harris

Rule 166-A. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion for summary judgment shall

state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law

on the issues as expressly set out in the motion or in an answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal. A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the

hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and

shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be

obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Art. 1728. Appellate jurisdictiion

The Supreme Court shall have appellate jurisdiction, except in criminal law matters, co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Appeals from appealable judgment of trial courts:

1. Those in which the judges of the Courts of Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Appeals holds differently from a prior decision of another Court of Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. Those involving the revenues of the State.

5. Those in which the Railroad Commission is a party.

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Appeals is made final by statute.

Art. 1729. Writ of error or certificate

All causes mentioned in the preceding article may be carried to the Supreme Court either by writ of error or by certificate from the Court of Appeals, but the Court of Appeals may certify any question of law arising in any such case at any time they may choose, whether before or after the decision of the case in said Court.

APPENDIX C

NO. 139,362

IN THE MATTER OF	§	IN PROBATE COURT
	§	NO. 2
THE ESTATE OF	§	OF
	§	
HOWARD ROBARD HUGHES, JR.	§	HARRIS COUNTY, TEXAS

ORIGINAL ANSWER OF CLARE BENEDICT HUDENBURG

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CLARE BENEDICT HUDENBURG, and files this her Answer to the Applications for Heirship filed in this cause, and would respectfully show unto the Court the following:

Clare Benedict Hudenburg is the daughter of Howard Robard Hughes, Jr., Deceased, and Louise Benedict. Defendant will show the Court that the Deceased died on April 5, 1976, while en route from Mexico to the city of Houston, Texas, and that the Deceased died without leaving a valid will. Therefore, said Defendant is entitled to that part of

the Estate of the Deceased which passes to natural born children under the laws of intestacy of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, CLARE BENEDICT HUDENBURG enters her appearance in this cause and seeks a determination by this Court of her heirship to the Estate of Howard Robard Hughes, Jr., Deceased.

Respectfully submitted,

REYNOLDS, ALLEN, COOK,
PANNILL & HOOPER
Incorporated

By: /s/ P. J. Murphey Harmon
State Bar No. 09019500

By: /s/ Jaime A. Drabek
State Bar No. 06102410

1100 Milam Bldg., 16th Floor
Houston, Texas 77002
(713) 651-1300

ATTORNEYS FOR CLARE BENEDICT HUDENBURG

OF COUNSEL:

HERZFELD & RUBIN, By Martin S. Friedlander
1888 Century Park East
Los Angeles, California 90067
(213) 553-0451

NO. 139,362

IN THE MATTER OF	§	IN PROBATE COURT
	§	NO. 2
THE ESTATE OF	§	OF
	§	
HOWARD ROBARD HUGHES, JR.	§	HARRIS COUNTY, TEXAS

ORDER

On this day came on for consideration in the above captioned matter, the Motion of REYNOLDS, ALLEN, COOK, PANNILL & HOOPER to withdraw as counsel for Defendant CLARE BENEDICT HUDENBURG in this cause, and the Court, having considered said Motion, is of the opinion that same should be granted. It is, accordingly,

ORDERED that Reynolds, Allen, Cook, Pannill & Hooper be, and is hereby granted leave to withdraw as counsel for Defendant Clare Benedict Hudenburg in this cause.

SIGNED this ____day of June, 1981.

/s/ Pat Gregory
PAT GREGORY,
PROBATE JUDGE

NO. 139,362

IN THE MATTER OF	§	IN PROBATE COURT
	§	NO. 2
THE ESTATE OF	§	OF
	§	
HOWARD ROBARD HUGHES, JR.	§	HARRIS COUNTY, TEXAS

MOTION OF AVIS HUGHES McINYRE AND NORTON BOND, EXECUTOR OF THE ESTATE OF RUSH HUGHES FOR SUMMARY JUDGMENT AGAINST CLARE BENEDICT HUDENBURG

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, AVIS HUGHES MCINTYRE and NORTON BOND, EXECUTOR OF THE ESTATE OF RUSH HUGHES, and with leave of Court obtained to file this motion which is set for hearing at 9:00 a.m. on July 13, 1981 move the Court for Summary Judgment in the following particulars:

I.

On April 2, 1981, CLARE BENEDICT HUDENBURG filed an original answer to the Application for Heirship filed in the above styled proceedings, alleging that she is the daughter of the deceased and therefore entitled to inherit that

portion of the estate which passes to natural born children under the laws of intestacy of the State of Texas.

II.

CLARE BENEDICT HUDENBURG has no standing in these proceedings and is barred as a matter of law from inheriting from the estate of the deceased since there is no genuine issue of material fact that she can qualify for heirship status pursuant to Sec. 42(b) of the Texas Probate Code.

III.

CLARE BENEDICT HUDENBURG has offered as proof of her claim an Illinois Certificate of Birth dated July 24, 1940 (attached). This document, as a matter at law, raises no genuine issue of material fact regarding this claim for two reasons:

(1) The document reflects that the mother of CLARE BENEDICT HUDENBURG is Louise Benedict. CLARE BENEDICT HUDENBURG asserts under oath in her deposition on file that this

person identified as her mother is in fact Lois V. McPherson of 1613 N.E. 2d Street, Minneapolis, Minnesota, and that this woman is capable of attesting to CLARE BENEDICT HUDENBURG's assertion that Howard Robart Hughes, Jr. was her natural father.

Movants herein attach to this motion a sworn affidavit of the same Lois V. McPherson wherein she states that she is not the mother of CLARE BENEDICT HUDENBURG and further that she has no knowledge of the paternity of CLARE BENEDICT HUDENBURG.

(2) The document reflects that the father of CLARE BENEDICT HUDENBURG is "unknown."

IV.

The pleadings, depositions and affidavits on file herein do not raise any genuine issue of material fact relevant to her assertions. Movants are therefore entitled to a Summary Judgment as a matter of law pursuant to Rule 166A, Tex. R. Civ. P.

WHEREFORE, PREMISES CONSIDERED, AVIS HUGHES MCINTYRE and NORTON BOND, EXECUTOR OF THE ESTATE OF RUSH HUGHES

prays that this Court enter Summary Judgment denying and dismissing with prejudice the heirship claim of CLARE BENEDICT HUDENBURG. The MCINTYRE parties further respectfully pray for such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

FISHER, ROCH &
GALLAGHER

Wayne Fisher
TBA #07057000

Shelton Smith
TBA #18578500

/s/ Wayne Fisher

2600 Two Houston Center
Houston, Texas 77010
713-654-4433

NO. 139,362

IN THE MATTER OF	§	IN PROBATE COURT
	§	NO. 2
THE ESTATE OF	§	OF
	§	
HOWARD ROBARD HUGHES, JR.	§	HARRIS COUNTY, TEXAS

MOTION OF GEORGE F. NEFF FOR SUMMARY JUDGMENT AGAINST CLARE BENEDICT HUDENBERG

Now comes George F. Neff, Executor of the Estate of Annette Gano Lummis, and moves the Court for summary judgment against Clere Benedict Hudenberg and for such would show the Court:

I.

Clare Benedict Hudenberg has alleged that she is the daughter of Howard R. Hughes, Jr. and Louise Benedict and that she is entitled to a share of the Hughes Estate which passes by intestacy to children under Texas law.

II.

The applicable law and summary judgment proof on file in this cause

demonstrate that there is no genuine issue of material fact and that the claim of Clare Benedict Hudenberg is barred as a matter of law.

III.

The applicable law pertaining to inheritance by legitimated children contained in Section 42, Texas Probate Code bars this claim as a matter of law.

IV.

The applicable period of limitation contained in TEX. REV. CIV. STAT. arts. 5529 and 5535 bar this claim as a matter of law.

Wherefore, Premsies Considered George F. Neff prays that his motion for summary judgment be granted, that the Court enter summary judgment denying and dismissing with prejudice the heirship claim of Clare Benedict Hudenberg, and for such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

ANDREWS, KURTH, CAMPBELL
& JONES

By /s/ O. Clayton
Lilienstern
TBA No. 12352000
Berry D. Bowen
TBA No. 02721050

2500 Exxon Building
Houston, Texas 77002
(713) 652-2500

Attorneys for George F.
Neff, Executor of the
Estate of Annette Gano
Lummis

NO. 139,362

IN THE MATTER OF	§	IN PROBATE COURT
	§	NO. 2
THE ESTATE OF	§	OF
	§	
HOWARD ROBARD HUGHES, JR.	§	HARRIS COUNTY, TEXAS

ORDER GRANTING LEAVE TO AVIS HUGHES McINTYRE AND NORTON BOND, EXECUTOR OF THE ESTATE OF RUSH HUGHES AND GEORGE F. NEFF TO FILE MOTION FOR SUMMARY JUDGMENT AGAINST CLARE BENEDICT HUDENBURG

At the previously scheduled pretrial conference conducted in open court after notice to all counsel of record on June 26, 1981, AVIS HUGHES McINTYRE AND NORTON BOND, EXECUTOR OF THE ESTATE OF RUSH HUGHES AND GEORGE F. NEFF presented to the court motions for leave to file Motions for Summary Judgment against CLARE BENEDICT HUDENBURG pursuant to Rule 166A, Texas Rules of Civil Procedure.

Having considered these motions and found them to be proper in form, the Court hereby grants AVIS HUGHES McINTYRE AND NORTON BOND, EXECUTOR OF THE ESTATE

OF RUSH HUGHES AND GEORGE F. NEFF leave to file Motions for Summary Judgment against CLARE BENEDICT HUDENBURG with notice to opposing counsel and hereby sets these motions for hearing for hearing at 9:00 a.m., Monday, the 13th day of July, 1981.

Signed July 13, 1981.

/s/ Pat Gregory
PAT GREGORY, JUDGE
PROBATE COURT NO. 2
HARRIS COUNTY, TEXAS

NO. 139,362

ESTATE OF	§	IN PROBATE COURT
	§	
HOWARD ROBARD	§	NUMBER TWO
HUGHES	§	
	§	
	§	HARRIS COUNTY,
DECEASED	§	TEXAS

JUDGMENT

On the 13th day of July, 1981, came on to be heard the Motions of George F. Neff and of Avis Hughes McIntyre and Norton Bond for Summary Judgment Against Clare Benedict Hudenburg in the Proceedings to Declare Heirship in the above-entitled and numbered cause. It appearing to the Court that such motions were made in proper form and time, that proper service thereof had been made, that at a duly noticed scheduled pre-trial conference movants obtained leave of court to shorten the time between the filing of the motion and the time for hearing, that all interested parties were properly noticed for the July 13, 1981, hearing

date, and that the parties were before the Court for hearings thereon; and, after hearing arguments of counsel in open court, it further appearing that the motions are good and should be granted, the Court FINDS, ORDERS, ADJUDGES AND DECREES as follows:

1. Upon hearing argument from all interested parties and upon consideration of the pleadings, depositons, affidavits and other summary judgment evidence on file herein, it appeared to the Court (i) that the said motions for summary judgment had been made in proper form and time, (ii) that proper service and notice of hearing thereof had been made, and (iii) that the motions, the records of proceedings herein, including the pleadings, depositions, affidavits, and other summary judgment evidence and the briefs and arguments of the parties

demonstrated an absence of a genuine issue of any material fact and that, as a matter of law, George F. Neff and Avis Hughes McIntyre and Norton Bond are entitled to judgment and relief against Clare Benedict Hudenburg as hereinafter provided for.

2. It is, accordingly, ORDERED, ADJUDGED and DECREED that the Heirship Claim of Clare Benedict Hudenburg be, and the same is hereby, denied and dismissed with prejudice, and that Clare Benedict Hudenburg does hereby, take nothing by virtue of her claim to be an heir at law of the decedent Howard R. Hughes, Jr.

All Court costs incurred in connection with the Heirship Claim of Clare Benedict Hudenburg shall be paid by Clare Benedict Hudenburg for which let execution issue if such costs are not seasonably paid.

Dated this 23 of December, 1981.

/s/ Pat Gregory
Judge Presiding

APPROVED:

ANDREWS, KURTH, CAMPBELL & JONES

By /s/ Thomas L. Schubert
Attorneys for
George F. Neff, Executor of
The Estate of Annette Gano
Lummis, Deceased

FISHER, ROCH & GALLAGHER

By /s/ Wayne Fisher
Attorneys for Avis Hughes
McIntyre and Norton Bond,
Executor of the Estate of
Rush Hughes, Deceased

Affirmed and Opinion filed December 9, 1982.

CLARE BENEDICT HUDENBURG, Appellant

No. C14-82-108CV VS.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF ANNETTE GANO LUMMIS, AVIS HUGHES MCINTYRE AND NORTON BOND, EXECUTOR OF RUSH HUGHES, Appellees

- - - - - -

Appeal from the Probate Court No. 2 of Harris County, Texas Cause, No. 139,362

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Appellant appeals from a summary judgment against her claim that she is an heir at law of Howard R. Hughes., Jr. deceased.

On June 26, 1981, appellees obtained leave of court to file motions for summary judgment to be heard on July 13, 1981. Appellant was not present at the June 26th pretrial conference and made no objection to hearing the motions on July 13th.

At the summary judgment hearing, appellees presented evidence, including deposition testimony of Mrs. Hudenburg. Summary judgment was granted. Appellant was not represented at this portion of the hearing. Shortly thereafter, counsel for appellant arrived and asked that the hearing be reopened for the purpose of presenting a motion for continuance. The hearing was reopened and appellant's counsel presented his motion, alleging that appellant had intended to appear pro se but was physically unable. Appellant requested a continuance until she could travel and participate in the trial. The motion for continuance was denied. Additionally, counsel for appellant presented a motion "For Court's Compliance With Texas Code of Judicial Conduct" urging that television cameras and lights not be allowed in the court room. No other issues in opposition to the motions for summary judgment were presented.

In her first three points of error, appellant contends that at the time the probate court granted leave to file appellees motions for summary judgment, she was not represented by counsel and was given insufficient time to prepare a response to appellees motions. She, therefore, asserts that it was error to deny her motion for continuance. The record reveals that just eighteen days prior to the date on which leave to file the motions for summary judgment was granted, appellant signed a sworn motion stating that she was "currently represented by the law firm of Herzfeld and Ruben in Los Angeles...." Additionally, counsel for appellant appeared in the summary judgment hearing and presented a motion for continuance based solely on appellant's physical condition. Appellant's counsel presented no summary judgment evidence specifically defining the controverted issues or defects in the movant's proof

that would defeat the motion. City of Houston v. Clear Creek Basis Authority, 589 S.W.2d 671 (Tex. 1979). He did not file affidavits stating reasons why appellant could not present facts "essential to justify his opposition" as required by Rule 166-A (f) of the Texas Rules of Civil Procedure.

Rule 166-A (c) requires that, except on leave of court, a motion for summary judgment is to be served at least twenty-one days before the date of the hearing on the motion. However, a party may waive the twenty-one day notice requirement if he receives notice, appears at the summary judgment hearing and does not file an affidavit as required by Rule 166-A (f). Chandler v. Escobar, 605 S.W2d 524 (Tex. Civ. App. El Past 1980, no writ). Such is the situation in this case. Additionally, appellant's points are raised for the first time on appeal. "Both the reason for the summary

judgment and the objections to it must be in writing and before the trial judge at the hearing." City of Houston v. Clear Creek Basin Authority, supra.

> Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

TEX. R. CIV. P. 166-A (c). Appellants first three points of error are, therefore, overruled.

In her forth point of error, appellant complains that appellees motions for summary judgment were based solely on deposition testimony of appellant which was not on file on the date of the hearing. Rule 166-A (c) provides that:

> The judgment sought shall be rendered forthwith if pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, on file at the time of the hearing or filed

thereafter with the permission of the court shows that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

The record shows that the deposition was on file almost five months before the judgment was entered by the trial court. The judgment reflects that the court considered the deposition. Every reasonable presumption consistent with the record is to be viewed in favor of the judgment. Marez v. Moeck, 608 S.W.2d 740 (Tex. Civ. App. - Corpus Christi 1980, no writ). Additionally, appellant's failure to object to the use of the deposition testimony at the hearing constituted a waiver of any right to complain of its use on appeal. City of Houston v. Clear Creek Basin Authority, supra. Appellant's fourth point of error is, therefore, overruled.

The judgment of the trial court is affirmed.

/s/ Paul Pressler
Associate Justice

Affirmed and Opinion filed December 9, 1982

Panel consists of Associate Justice Pressler, Murphy and Robertson.

CLARE BENEDICT HUDENBURG, Appellant

VS.

GEORGE F. NEFF, INDEPENDENT EXECUTOR OF ANNETTE GANO LUMMIS, AVIS HUGHES MCINTYRE AND NORTON BOND, EXECUTOR OF RUSH HUGHES, Appellees

JUDGMENT

"This cause, an appeal from the judgment in favor of Gorge F. Neff, Avis Hughes McIntyre & Norton Bond, appellees signed December 23, 1981, came on to be heard on the transcript of the record. The same having been inspected, it is the opinion of this Court that there is no error in the judgment. It is ordered and adjudged that the judgment of the Court below be affirmed.

In addition, it is ordered tnat appellant pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

April 27, 1983

Mr. Brantly Harris, Attorney
500 Natural Gas Pipeline Tower
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Houston, Texas 77056

Mr. Berry D. Bowen, Attorney
4200 Texas Commerce Tower
Houston, Texas 77002

Mr. Wayne Fisher, Attorney
Mr. Shelton Smith, Attorney
2600 Two Houston Center
Houston, Texas 77010

Dear Sirs:

The application for writ of error in the case of CLARE BENEDICT HUDENBURG vs. GEORGE F. NEFF ET AL., No. C-1904, was this day refused. No reversible error.

Very truly yours,

Garson R. Jackson

Garson R. Jackson, Clerk

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

June 8, 1983.

Mr. Brantley Harris, Attorney
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4200 Texas Commerce Tower
Houston, Texas 77002

Mr. Wayne Fisher, Attorney
Mr. Shelton Smith, Attorney
2600 Two Houston Center
Houston, Texas 77010

Dear Sirs:

The motion for rehearing in the case of CLARE BENEDICT HUDENBURG vs. GOERGE F. NEFF ET AL., No. C-1904, was this day overruled.

Very truly yours,

Garson R. Jackson

Garson R. Jackson, Clerk